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No. 79-1592

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK R. WEST, PETITIONER

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-26) is reported at 611 F. 2d 710. The opinion of the district court (Pet. App. A-27 to A-33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 1979. A petition for rehearing was denied on January 14, 1980. The petition for a writ of certiorari was filed on April 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is required to exhaust his administrative remedies before seeking judicial review.

2. Whether the Secretary of Agriculture has authority to withdraw meat grading services from persons who are found, after a hearing, to have committed acts that undermine the integrity of the Secretary's grading program.

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions appear at Pet. Apps. B and C.

STATEMENT

1. The Agricultural Marketing Act of 1946 provides for "an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities." 7 U.S.C. 1621. It authorizes the Secretary "[t]o inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as [he] may prescribe." 7 U.S.C. 1622(h). The Act also empowers the Secretary to "promulgate such orders, rules, and regulations as he deems necessary to carry out the provisions of this chapter." 7 U.S.C. 1624(b).

Pursuant to these provisions, the Secretary administers a program for grading animal carcasses according to the quality and quantity of the meat.[1] The Secretary's regulations state that he will (1) extend grading services to any qualified person upon application and (2) withdraw services from any person whose conduct undermines the

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[1]The quality classifications for fresh meat are prime, choice, good, standard, commercial, utility, cutter, canner, and cull. 7 C.F.R. Part 2853, Subpart B. The quantity classifications include No. 1, No. 2, No. 3, No. 4, yield grade 1, yield grade 2, yield grade 3, yield grade 4, and yield grade 5. *Ibid.*

integrity of the grading program. 7 C.F.R. 2853.6 and 2853.11.[2] The regulations define the types of actions that can lead to the withdrawal of grading services to include fraud, bribery, intimidation and counterfeiting of official marks and labels. 7 C.F.R. 2853.11.

The Secretary's regulations expressly provide for a trial-type hearing before deprivation of grading services can occur. 7 C.F.R. 2853.11 and 7 C.F.R. Part 2850, Subpart C. Based upon evidence presented at such a hearing, an administrative law judge is empowered to decide whether grading services should be withdrawn and, if so, how long the withdrawal period should last. His decision is subject to review by a judicial officer within the agency and the judicial officer's decision is subject to review by the federal district court. Even if this administrative process results in the withdrawal of grading services, the person subject to the Secretary's order does not lose his ability to engage in his chosen profession. No one need receive the Secretary's grading services in order to sell meat in interstate commerce. 7 U.S.C. 1622(h).

Regulations authorizing the withdrawal of meat grading services have been in effect since 1936. 1 Fed. Reg. 2126, 2129 (1936).[3] When Congress passed the

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[2]During the pendency of this lawsuit, the Department of Agriculture recodified its regulations. This brief uses the current citations. The opinions below refer to the 1977 edition of the Code of Federal Regulations.

[3]Between 1925 and 1946, the Secretary furnished grading services in accordance with specific directives contained in annual appropriations acts for the Department of Agriculture. See 43 Stat. 844 (1925); 44 Stat. 523 (1926); 44 Stat. 998 (1927); 45 Stat. 561 (1928); 45 Stat. 1212 (1929); 46 Stat. 418 (1930); 46 Stat. 1268 (1931); 47 Stat. 637 (1932); 47 Stat. 1459 (1933); 48 Stat. 493 (1934); 49 Stat. 275 (1935); 49 Stat. 1450 (1936); 50 Stat. 425 (1937); 52 Stat. 740 (1938); 53 Stat. 968 (1939); 54 Stat. 555 (1940); 55 Stat. 431 (1941); 56 Stat. 687 (1942); 57 Stat. 421 (1943); 58 Stat. 453 (1944); 59 Stat. 158

Agricultural Marketing Act of 1946, the Secretary promulgated the regulations involved in the present case pursuant to the new statute. 13 Fed. Reg. 1275, 1278 (1948). Petitioner is the first person in 40 years who has challenged the Secretary's authority to withdraw grading services from persons whose conduct threatens the reliability of the grading program as a whole.

2. Petitioner served as president and chairman of the board of directors of the nation's second largest beef packing house from 1965 to 1976. During that period, he encouraged his employees to bribe federal inspectors to obtain favorable grading services. In January 1977, petitioner pleaded guilty to the charge of conspiring to misbrand meat to be transported in interstate commerce (Pet. App. A-2). At a hearing to determine the voluntariness of his guilty plea, petitioner admitted:

> When I was president of [American Beef Packers, Inc.] we always attempted to have our plants run efficiently and obtain the most favorable meat grading possible. I directed ABP employees to take whatever action was required to obtain these two goals. One thing that was necessary was to give gifts and other gratuities to federal meat graders. This was done by ABP employees and I was aware of it being done.[4]

Following petitioner's guilty plea and conviction, the Department of Agriculture instituted proceedings to withdraw grading services. The administrative complaint

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(1945); 60 Stat. 290 (1946). The Secretary promulgated the 1936 regulations authorizing the withdrawal of grading services pursuant to this statutory authority.

[4] *United States* v. *West*, CR 75-0-86 (D. Neb. Jan. 14, 1977), Tr. 7.

alleged that petitioner knowingly engaged in bribery of a federal meat grader and stated that the Department was seeking withdrawal "for a period of time necessary to insure the integrity of the Meat Grading and Acceptance Service, and such additional time as may be required until [petitioner] can prove to the Service that [he] will not in the future violate the Agricultural Marketing Act [and its implementing regulations]" (Pet. App. A-2 to A-3). Petitioner was advised that he could file a formal answer to the complaint and request a hearing.

Instead of presenting his defense in the prescribed administrative forum, petitioner sought injunctive relief against the Secretary on three occasions in the United States District Court for the District of Nebraska. On each occasion, the district court denied injunctive relief.[5] Nonetheless petitioner's lawsuits have significantly delayed the issuance of a final agency order. Nearly three years have passed since the filing of the administrative complaint and no hearing has yet been held. In the absence of a final order, petitioner can continue to receive grading services (Pet. App. A-3).

Following the district court's denial of injunctive relief (Pet. App. A-27 to A-33), the court of appeals affirmed

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[5]Petitioner initially alleged that the institution of agency proceedings would violate the terms of his plea agreement. The district court rejected this contention. *West* v. *United States Department of Agriculture*, Civ. No. 77-0-374 (D. Neb. Jan. 25, 1978). He then sought to intervene in a Chapter XI reorganization proceeding involving his bankrupt company to avail himself of a protective order barring collateral proceedings against the bankrupt. The district court affirmed the bankruptcy judge's denial of intervention. *In re American Beef Packers*, BK 75-0-17 (D. Neb. Sept. 6, 1978). Petitioner then filed the instant suit, alleging that the Secretary lacks statutory authority to proceed against him. The district court rejected this contention and directed petitioner to exhaust his administrative remedies (Pet. App. A-27 to A32).

(*id.* at A-1 to A-26). The court concluded that petitioner need not exhaust his administrative remedies and considered petitioner's challenge to the Secretary's regulations on the merits. The court held that the Agricultural Marketing Act of 1946 gives the Secretary rule-making power and that the Secretary's regulations governing the withdrawal of grading services are reasonably adapted to implement the provisions of the statute (*id.* at A-15 to A-26).

ARGUMENT

Review by this Court of petitioner's claims is unwarranted at this time because petitioner has failed to exhaust his administrative remedies. No administrative hearing has yet been held and the results of such a hearing cannot now be predicted. In any event, the decision of the court of appeals is correct and does not conflict with any decision rendered by this Court or any other court of appeals. Further review is therefore unnecessary.

1. This Court's decisions establish that litigants must exhaust available administrative remedies before seeking judicial relief. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). An exception to this requirement arises when a litigant makes a showing of irreparable injury and the government asserts no countervailing interest in requiring exhaustion. Compare *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969), with *Yakus* v. *United States*, 321 U.S. 414, 433 (1944). However, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Accord, *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U.S. 209, 222 (1938); *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, 303 U.S. at 51-52. Petitioner will suffer no harm other than

litigation expense as a result of pursuing his administrative remedies to completion.[6] The insubstantial nature of petitioner's interest in bypassing the administrative process does not outweigh the strong governmental interest in preventing piecemeal appeals and avoiding disruption of the administrative process. *McKart* v. *United States*, *supra*, 395 U.S. at 194; *FPC* v. *Metropolitan Edison Co.*, 304 U.S. 375, 385 (1938); *Macauley* v. *Waterman Steamship Co.*, 327 U.S. 540, 544-545 (1946). Because petitioner has not exhausted his administrative remedies, he is not entitled to injunctive relief against the Secretary or judicial review of the Secretary's regulations.[7]

2. In any event, the court of appeals correctly rejected petitioner's claim (Pet. 11-20) that the Secretary lacks power to promulgate rules providing for the termination of grading services. Contrary to petitioner's assertion (*id.* at 13), the Agricultural Marketing Act of 1946 is not "purely a research bill." The Act repeatedly and expressly refers to the Secretary's regulatory and rule-making powers. The preamble to the Act states that a major purpose of the Act is to provide for "an integrated

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[6]Meat grading services can only be withdrawn in accordance with a final administrative order (Pet. App. A-3). Both the administrative law judge and the federal district court can stay such an order pending judicial review. Petitioner will thus continue to receive grading services until he has had an opportunity to litigate his claims fully and fairly.

[7]It is sufficient to require exhaustion that there is a possibility that the agency may agree with the litigant's claim or, if disagreeing, may provide a definitive explication of its position that will facilitate judicial review. An agency's interpretation of its own organic statute is entitled to judicial deference under familiar principles of administrative law. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Ford Motor Credit Co.* v. *Milhollin*, No. 78-1487 (Feb. 20, 1980), slip op. 10.

administration of all laws enacted by Congress to aid the distribution of agricultural products through * * * regulatory activities." 7 U.S.C. 1621. The Act empowers the Secretary to provide grading services and also directs him to prescribe rules and regulations "to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire." 7 U.S.C. 1622(h). In addition, the Act expressly authorizes the Secretary to adopt substantive rules to implement the provisions of the statute. 7 U.S.C. 1624(b). The validity of a regulation promulgated under such a provision "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' " *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

Petitioner attempts to brush aside this express statutory authority on the ground that, during the floor debates on the Agricultural Marketing Act, Senator Russell assured Senator Taft that the bill would not increase the power of the Department of Agriculture (see Pet. 11-12). From this brief interchange, petitioner concludes that the Secretary has no regulatory power at all under the Act. A more plausible explanation of Senator Russell's statement is that the Act did not extend the power of the Department because it merely consolidated preexisting regulatory functions. See 7 U.S.C. 1621. By the time Congress passed the Agricultural Marketing Act of 1946, the Secretary had been furnishing meat grading services for 20 years. See note 3, *supra*. And as the court of appeals explained (Pet. App. A-23), the Secretary has withdrawn grading services in cases of serious misconduct since 1936. See 1 Fed. Reg. 2126, 2129 (1936).

The court of appeals also correctly rejected petitioner's contention (Pet. 19) that, absent express statutory authority, agencies have no power to refuse to deal with persons whose conduct threatens the integrity of their regulatory programs. This Court's decisions establish that federal agencies have an inherent power to protect themselves in this fashion. See *L.P. Steuart and Bros.* v. *Bowles*, 322 U.S. 398, 403-407 (1943); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 121123 (1926). The courts of appeals have also recognized that agencies may decline to provide services to or do business with persons whose conduct undermines the effectiveness of their programs. *Touche Ross & Co.* v. *SEC*, 609 F. 2d 570, 582 (2d Cir. 1979); *Jacquet* v. *Westerfield*, 569 F. 2d 1339, 1344-1346 (5th Cir. 1978); *Gonzalez* v. *Freeman*, 334 F. 2d 570, 576-577 (D.C. Cir. 1964) (Burger, J.).

Finally, the court of appeals correctly rejected petitioner's contention (Pet. 17-18) that the Secretary lacks power to suspend services under the Act because certain other statutes contain express suspension or penalty provisions. As the court explained (Pet. App. A-23 to A-24), the legislative history of the Agricultural Marketing Act indicates that Congress knew and approved of the Secretary's long established suspension policy. The court also noted that the statutes petitioner relies on differ from the Agricultural Marketing Act in an essential respect: they direct the Secretary to regulate various activities by issuing licenses or imposing forfeitures (Pet. App. A-20). By contrast, the Agricultural Marketing Act establishes a voluntary program. 7 U.S.C. 1622(h). The Secretary cannot require anyone to use official grading services as a condition to doing business. He cannot impose fines or penalties. He can, however, protect his program by specifying types of misconduct that frustrate the program and necessitate suspension of services. *L.P. Steuart and Bros.* v. *Bowles*, *supra*.

3. Contrary to petitioner's contention (Pet. 20-22), the Secretary has not transgressed the rule of *SEC* v. *Chenery Corp.*, 319 U.S. 80 (1943).[8] Petitioner's repeated efforts to enjoin the administrative process have thus far prevented the Secretary from compiling the sort of record upon which a discretionary decision, supported by a statement of reasons, can be rendered. Moreover, there is no merit to petitioner's argument (Pet. 22) that the Secretary promulgated his regulations solely under the authority contained in 7 U.S.C. 1622(h). Both the Secretary's notice of rulemaking and the preamble to the final regulations rely on the Agricultural Marketing Act as a whole. See 12 Fed. Reg. 7843 (1947); 13 Fed. Reg. 1275 (1948). Thus, when petitioner filed suit challenging the validity of the regulations the Secretary properly invoked and the courts below properly considered all relevant statutory provisions. See *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 245-248 (1964).[9]

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[8]Neither of the courts below addressed this argument because petitioner raised it for the first time in his petition for rehearing and suggestion for rehearing en banc in the court of appeals. The court of appeals denied the petition without comment.

[9]The administrative complaint does charge petitioner with violating 7 U.S.C. 1622(h) and states that proceedings will be brought pursuant to that provision and the regulations governing the withdrawal of services. However, an administrative complaint need not set forth a complete explication of the agency's regulatory powers. Petitioner's *Chenery* argument boils down to the contention that the Secretary may not fully defend this lawsuit because he did not anticipate its filing and did not provide a complete justification for his regulations in the administrative complaint. *Chenery* does not suggest such a bizarre result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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